

**THE CITY OF NEW CASTLE
BOARD OF ADJUSTMENT**

NOTICE OF DECISION

APPLICANT: Brandywine Valley SPCA
600 South St.
New Castle, DE 19720

OWNER: 508 South Street LLC
104 Bentley Lane
Greenville, DE 19807

NCC TAX PARCEL NO. 21-014.00-390
PUBLIC HEARING DATE: July 15, 2020
DATE OF DECISION: August 4, 2020

REQUESTED: Applicant requested a special exception under §230-21.1 E (1) of the City Code to permit construction of a 6 foot fence on property located in the Downtown Gateway District known as 580 South Street, New Castle, Delaware, Tax Parcel No. 21-014.00-409 (the "Property").

The Board of Adjustment (the "Board") may grant a special exception for construction of fencing or wall structures on DG (Downtown Gateway) zoned properties that were formerly zoned SC (Service Commercial) or I (Industrial) under §230-21.1(E) (1) of the Code where the Board determines that special circumstances, privacy or security concerns exist that cannot be practically addressed through other reasonable alternatives. In ruling on such applications, this section requires the Board to consider, among other things:

- (a) Whether the size or configuration of the proposed fence provides a reasonable fenced area for the owner's proposed use or purpose without creating significant harm to adjacent properties or the neighborhood.
- (b) Wood, vinyl or iron fencing shall be preferred. Walls shall be constructed of brick or stone. Where chain-link or similar forms of security fencing are required they should be reasonably screened from the view of adjoining streets, open space and properties by landscaping which is primarily evergreen.
- (c) The height of the fence or wall must not exceed six feet. Any wall or fence must be constructed so the finished side (i.e., the side that does not contain the horizontal fence supports and the in-ground fence posts) faces adjacent streets and/or properties.
- (d) A fence or wall must be constructed so that it does not extend into the front yard of the property beyond the face of the building erected thereon.
- (e) All other provisions of Chapter 230, Article VIII, of the City Code

pertaining to special exceptions and hearings before the Board of Adjustment not in conflict with §230-21.1 E (1) shall apply. Specifically, Article III, §230-57 B requires the Board to determine that the special exception is in harmony with the purpose and intent of the Code and will not adversely affect the public interest, and permits the Board to impose conditions and safeguards as the Board deems appropriate.

The meeting was conducted using Zoom technology. Mayor Michael J. Quaranta chaired the meeting. City Engineer David J. Athey and City Solicitor Daniel R. Losco comprised the remaining members of the Board. The Mayor read into the record the official notice of the hearing. That notice was timely published in accordance with the law and affidavits of publishing in both *The New Castle Weekly* and *The News Journal* were entered into the record.

Shawn Tucker, Esq. appeared on behalf of the SPCA. Witnesses included Mark Ziegler, P.E. of McBride & Ziegler and Walter Fenstermacher, Director of Programs for the Brandywine Valley SCPA. Both witnesses were sworn in by Mr. Losco.

Mr. Tucker summarized the legal standard for a special exception under §230-21.1 E (1) arguing that all preconditions are satisfied. He introduced a site plan prepared by Mr. Ziegler's office identifying the Property, the existing chain links fences thereon, and the proposed 6' vinyl fence, 167 linear feet in length, intended to join portions of the existing chain link fences so as to create an enclosed area. Mr. Ziegler testified that this enclosed area would total 15,049 sq. feet to provide a "play yard" for dogs housed at the SPCA facility on the Property. The play yard area is all grass. The existing chain link fences on the Property would remain. Mr. Tucker explained that because the SPCA is a non-profit organization, cost was a factor in keeping the existing chain link fence and not enclosing the entire play yard with a vinyl fence. Mr. Ziegler indicated that the proposed fence would not extend into the front yard of the Property beyond the face of the building existing thereon. He stated that the new fence would be visible to adjacent properties but the finished side would face those properties. He further stated that the fence will have no adverse impact on public services and/or facilities nor will it have any impact on highway or pedestrian traffic in the area. He felt that the fence would not adversely affect the public.

Mr. Fenstermacher then testified that the SPCA houses 70-80 dogs; that the goal is to walk every dog on-leash once per day, but they strive to walk them three times daily; that it takes approximately 15 staff/volunteers to walk the dogs each time; that the dogs are walked in the proposed play yard area and at the beach along with Delaware River; and that this same process has been used since December 2015. Mr. Tucker stated that the applicant does not have enough volunteers to ensure each dog is exercised multiple times each day.

Mr. Fenstermacher further testified that the proposal is to have play groups of 10-15 dogs each and to exercise them off leash for 20-30 minutes daily. Play groups would be supervised by 9 staff/volunteers. The play groups would rotate throughout the course of the day from 8:00 am to 7:00 pm Monday through Fridays and 7:00 am through 5:00 pm on weekends. All 70-80 dogs would have one daily play group session and be walked on-leash two other times per day. Mr. Fenstermacher stated that the play group concept was recommended to them by Dogs Playing For Life (DPFL), a nationally renowned group focused on enrichment and behavior of animals in shelters. The play groups allow dogs to burn off excess energy and be less over-reactive in their kennels, which allows them to present better and be viewed as more adoptable.

In response to questioning about barking, Mr. Fenstermacher asserted that dogs in play groups are busy playing with each other and are less likely to vocalize. He added that there have been a number of complaints about odor coming from the shelter in the past, but no recent complaints of odor or noise. Mr. Athey asked how future complaints would be handled. Mr. Fenstermacher stated that the SPCA would respond quickly and dogs not suitable for group play would be removed from the group.

Mr. Losco questioned how the City could enforce violation of any conditions that might be placed on the special exception. Mr. Fenstermacher stated that the SPCA strives to be a good neighbor, but agreed that if there is no existing law for policing such conditions, the City would be unable to enforce any conditions imposed by the Board without the voluntary compliance of the SPCA.

During the public comment period, a letter received by the Board from adjacent neighbor, John DiMondi, was entered into the record. Mr. DiMondi's complaints in opposition to the application included a legal argument that the SPCA's kennel use of the Property should not have been permitted under the savings clause established by §230-21.1 E of the Code since kennels were not a permitted use under the Property's prior SC (Service Commercial) zoning. Hence, the special exception relief should not be available to the applicant. He cited Delaware case law indicating that a certificate of occupancy issued by a government in error gives no rights to the recipient. He further cited a prior Board decision from 2017 relating to the Property where the Solicitor questioned the kennel use. The 2017 Board nonetheless approved the applicant's request to enclose a roof overhang area with fencing without appeal.

No other member of the public appeared at the hearing to either support or oppose the application.

Mr. Losco suggested that the Applicant and Mr. Tucker be given time to review Mr. DiMondi's letter and the case law cited therein. The Mayor ordered a temporary recess of the application for this purpose while the Board proceeded to consider a different application on the

Board's agenda.

Following a recess of approximately one hour, the Board resumed consideration of the SPCA application to provide rebuttal time for Mr. Tucker. He distinguished the case law cited by Mr. DiMondi saying that in those cases, the complaining party had filed a timely appeal from the governmental action. He argued that Mr. DiMondi did not appeal the 2017 Board decision, hence it's too late for him to challenge the use of the Property. With respect to complaints of odor from the Property, Mr. Fenstermacher stated that he is not aware of any recent odor complaints and the SPCA continues to practice good husbandry by cleaning up the site and applying deodorizer in grassy areas. The record was then closed and the Board adjourned to its Business Meeting.

The Board discussed possible conditions including requiring the entire play area to be enclosed in vinyl siding for aesthetics and to minimize sound and visual disturbances; limiting the hours of operation for the play yard, but the Board expressed concern over the ability to police violations of these conditions and force the applicant back to the Board if complaints are received and not adequately addressed. Mr. Losco felt that Mr. Tucker had effectively rebutted the legal arguments raised by Mr. DiMondi and further pointed out that Mr. DiMondi did not timely appeal the initial grant of a certificate of occupancy for the SPCA facility or the 2017 Board decision.

Mr. Athey motioned to deny the application and Mr. Losco seconded it. Mr. Losco voted in favor of the motion to deny for the following reasons:

- The mis-matched fencing provides for no visual barrier to the adjacent property;
- The applicant understood the condition of the Property when they took possession in 2015 and they have successfully operated there for five years. He sees no "special circumstances" required by Code that warrant a special exception;
- The applicant provided no evidence of "privacy or security" concerns that would justify a special exception under §230-21.1E (1);
- There is no evidence that the application is in the best interests of the City, provides convenience to the community or benefits the public welfare---rather, the benefit is wholly to the understaffed applicant;
- The play yard would substantially detract from the use of neighboring properties; the sights, sounds and smells of packs of dogs coming out seven days a week is negative in a visual, privacy, and sensory sense;
- Any restrictions or conditions offered cannot be enforced with any consistency; and
- The number of dogs in each play group is too great; the rotating frequency is too often; and the hours proposed seven days a week during virtually all waking hours present too great a burden on the use and enjoyment of surrounding properties.

Mr. Athey voted to deny the application as presented for all of the reasons cited by Mr. Losco and added the following reasons:

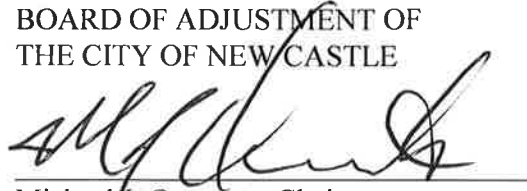
- All Board members felt a variety of conditions would be needed to approve the application and those conditions could not be effectively enforced;
- The chain link fence does not provide optimal screening;
- The Applicant did not substantiate statements of cost issues;
- Limiting the number of dogs in a group and the hours they would be outside is not feasible;
- The play yard would be in use during the majority of the day; and
- The SPCA was aware of the conditions of the Property and is pushing the envelope of what is a reasonable use of the site.

Mayor Quaranta also voted to deny the application as presented concurring in the rationale provided by Mr. Losco and Mr. Athey. He also provided the following reasons:

- There are a variety of conditions that would need to be placed on a Decision to grant the Application and those conditions could not be reasonably enforced;
- The non-conforming chain link fence is an issue;
- As the Downtown Gateway District transforms he would have liked to see many changes to make the site more attractive and limiting the hours; and
- The Applicant did not offer an option to use an area closer in proximity to the main building and farther from residential properties.

Vote: 3–0 (To deny application: Quaranta, Athey and Losco)

BOARD OF ADJUSTMENT OF
THE CITY OF NEW CASTLE



Michael J. Quaranta, Chairperson

NOTE: This decision is neither a building permit nor a Certificate of Occupancy. Appropriate permits must be obtained from the applicable governmental agencies prior to construction or establishment of any use on the property. This decision should be kept in a safe place with the property deed. This decision may be appealed to the Superior Court by any person aggrieved by it

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within 30 days of its filing in the Office of the Board of Adjustment.